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No. 02-575

IN THE
Supreme Court of the United States

NIKE, INC., *et al.*,
Petitioners,

v.

MARC KASKY,
Respondent.

On Writ of Certiorari to the Supreme Court of California

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Amici curiae addresses the following issue only:

Even assuming the California Supreme Court properly characterized the statements at issue in this case as "commercial speech," does the First Amendment, as applied to the states through the Fourteenth Amendment, permit subjecting speakers to the legal regime approved by that court in the decision below?

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BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states, including many in California.[1] WLF regularly appears before federal and state courts to promote economic

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief.

liberty, free enterprise, and a limited and accountable government.

In particular, WLF has devoted substantial resources over the years to promoting commercial speech rights, appearing before this Court in cases raising commercial speech issues. *See, e.g., Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525 (2001); *Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 173 (1999); *44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484 (1996). WLF recently successfully challenged the constitutionality of Food and Drug Administration restrictions on commercial speech. *Washington Legal Foundation v. Friedman*, 13 F. Supp. 2d 51 (D.D.C. 1998), *appeal dismissed,* 202 F.3d 331 (D.C. Cir. 2000).

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

Amici fully support Petitioners' contention that the speech at issue in this case is properly categorized as "noncommercial." *Amici* write separately to emphasize their particular concern over the second Question Presented and the California Supreme Court's apparent willingness to tolerate legal regimes that are likely to have a significant chilling effect on speech relating to issues of considerable public interest. *Amici* believe that the public interest in the dissemination of such speech will be undermined if the decision below is permitted to stand; that public interest exists

regardless whether the speech at issue is labeled "commercial" or "noncommercial."

Amici are filing this brief because of their interest in promoting the welfare of the business community and the public at large; they has no interest, financial or other, in the outcome of this lawsuit. Blanket consents to the filing of *amicus curiae* briefs have been lodged with the Court by the parties.

STATEMENT OF THE CASE

In the interests of brevity, WLF hereby incorporates by reference the Statement of the Case contained in the Brief for Petitioners.

In brief, Petitioner Nike, Inc. is the world's leading athletic apparel and equipment manufacturer. It products are manufactured by subcontractors at more than 700 facilities around the world. During the past decade, numerous critics of Nike have alleged that workers at many of these overseas facilities have been subject to substandard working conditions. These allegations have been widely reported in newspapers and on television programs and have become an issue of significant public interest. Petition Appendix ("Pet. App.") 3a.

Nike has responded by denying the charges. These denials were disseminated in a variety of ways, including through press releases, letters to newspapers, and letters to university presidents and athletic directors. *Id.* 4a. Nike also took out full-page newspaper advertisements to publicize a report that concluded that there was no evidence of illegal or

unsafe working conditions at Nike facilities in China, Vietnam, and Indonesia.

Some of the Nike denials reached consumers in California, including Respondent Marc Kasky. Kasky alleges that the denials were false, and that in disseminating them, Nike violated California's unfair competition law (UCL), Cal. Bus. & Prof. Code § 17200, and its false advertising law, Cal. Bus. & Prof. Code § 17500. He alleges that Nike made these false statements negligently and carelessly, Pet. App. 4a, and to induce consumers to purchase its products. He does not claim to have been injured by Nike's statements, but he seeks injunctive relief -- including disgorgement of money earned due to the false statements -- and attorney fees.

The trial court sustained Nike's demurrer without leave to amend, holding that the complaint was barred by the First Amendment. The court held that Nike's denials constituted noncommercial speech and as such was protected under the First Amendment from the types of sanctions Kasky sought to impose. *Id.* 4a-5a, 80a. The California Court of Appeal affirmed. *Id.* 66a-79a.

By a 4-3 vote, the California Supreme Court reversed and remanded. *Id.* 1a-30a. Accepting as true the allegations of the complaint, the court determined that the Nike denials should be deemed commercial speech:

> Because in the statements at issue here Nike was acting as a commercial speaker, because its intended audience was primarily the buyers of its products, and because the statements consisted of factual representations about its own business operations, we conclude that the statements were commercial speech for purposes of applying state laws designed to prevent false advertising and other forms of commercial deception.

Id. at 23a. The court held that the Nike denials were not exempt from categorization as commercial speech simply because "they related to a matter of significant public interest or controversy." *Id.* Because it deemed the denials commercial speech and because Kasky alleged that the denials were false, the court held that the speech was not entitled to *any* First Amendment protection:

> [C]ommercial speech that is false or misleading receives no protection under the First Amendment, and therefore a law that prohibits only such unprotected speech cannot violate constitutional free speech restrictions.

Id. 27a. Reversing the decision to sustain Nike's demurrer, the court remanded the case to the Court of Appeal for further proceedings. *Id.* 30a.

SUMMARY OF ARGUMENT

By permitting corporations to be haled into court and forced to defend their speech on matters of public concern based on an uninjured plaintiffs' mere belief that the speech is false, California has caused the entire business community to stand up and take notice. Business are likely to be far less willing to engage in such speech in light of those consequences. Even though a business may believe that its speech is noncommercial, it may well be deterred from speaking by the fear that a reviewing court might reach the opposite conclusion.

In general, this Court has attempted to divide all speech by commercial entities into one of two categories -- commercial and noncommercial -- and to allow that categorization alone to determine the level of First Amendment protection to be afforded. That approach has been unsatisfying. As the Court has repeatedly conceded, there is no easy method by which commercial and noncommercial speech can be differentiated, yet the consequences of how the speech is classified are huge in terms of how far a State may go in regulating the speech. Because it may never be possible to draw a bright-line distinction between commercial and noncommercial speech, *amici* respectfully suggest that the Court develop alternative First Amendment criteria for testing speech restrictions when the speech at issue falls somewhere near the gray area dividing the two speech categories.

Amici agree with Petitioners that the speech at issue in this case should be deemed noncommercial. But the Court need not resolve that issue to rule in Petitioners' favor. Rather, *amici* respectfully suggest that the Court declare that speech of public interest, regardless whether classified as commercial or noncommercial, should be accorded full First Amendment protection if the speech does not directly relate to the characteristics of a product or service offered for sale. Such a rule would be consistent with the Court's longstanding policy of giving greater First Amendment protection to speech on matters of public interest. At the same time, it would not adversely affect the government's interest in preserving a fair bargaining process because that interest is at its nadir when the speech at issue does not directly relate to the characteristics of a product or service offered for sale.

ARGUMENT

I. DETERMINING WHICH SIDE OF THE COMMERCIAL/NONCOMMERCIAL LINE SPEECH FALLS ONTO CAN BE VERY DIFFICULT AND NEED NOT BE ATTEMPTED WHEN THE SPEECH AT ISSUE IS ENTITLED TO FULL PROTECTION NO MATTER HOW CHARACTERIZED

In determining the degree of protection accorded speech under the First Amendment, the Court has drawn a distinction between "commercial speech" and other forms of protected speech. *See, e.g., Ohralik v. Ohio State Bar Association,* 436 U.S. 447, 455-56 (1978). Noncommercial speech is extended protection of the highest order. In contrast, commercial speech has been extended less, but certainly not insubstantial, protection than expressions that are noncommercial in nature. *See, e.g., Central Hudson Gas & Electric Corp. v. Public Service Comm'n,* 447 U.S. 557, 562-63 (1980).

Under current case law, how the speech at issue is categorized is often outcome-determinative. When the government seeks to regulate speech on the basis of its content, the government will almost always be deemed to have violated the First Amendment if the speech is noncommercial; but it will be granted substantially more leeway if the speech is commercial.

Yet, even though so much is often riding on the categorization decision, the line dividing the two categories has never been clearly drawn. The Court has struggled for more than two decades in its efforts to provide a clear

demarcation. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985) ("the precise boundaries of the category of . . . commercial speech" are "subject to doubt, perhaps"); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 419 (1993) (noting "the difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category"); *Edenfield v. Fane*, 507 U.S. 761, 765 (1993) ("ambiguities may exist at the margins of the category of commercial speech"); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 493 (1995)(Stevens, J., concurring in the judgment) ("the borders of the commercial speech category are not nearly as clear as the Court has assumed"). Because it may never be possible to draw a bright-line distinction between commercial and noncommercial speech, *amici* respectfully suggest that the Court should develop alternative First Amendment criteria for testing speech restrictions when the speech at issue falls somewhere near the gray area dividing the two speech categories.

Amici agree with Petitioners that the speech at issue in this case should be deemed noncommercial speech. But the Court need not resolve that issue in order to rule in Petitioners' favor. Rather, *amici* respectfully suggest that the Court declare that speech of public interest, regardless whether classified as commercial or noncommercial, should be accorded full First Amendment protection if the speech does not directly relate to the characteristics of a product or service offered for sale. Applying that standard, Nike's speech must be accorded full First Amendment protection, and the decision of the California Supreme Court must be reversed.

A. The Court's Various Tests for What Constitutes Commercial Speech Do Not Provide Clear Guidance in Many Circumstances

The Court has announced several different formulations for identifying commercial speech. Most frequently, the Court has defined "commercial speech" as speech that "propose[s] a commercial transaction." *Bd. of Trustees v. Fox*, 492 U.S. 469, 473 (1989); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976).

Determining when a commercial entity has been deemed to have proposed a commercial transaction is by no means an easy task, however. For example, in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983), the Court faced the issue of whether a condom manufacturer's unsolicited mass mailings of informational pamphlets regarding its products should be deemed commercial speech. The Court determined that the mailings did, indeed, constitute "commercial speech" -- "notwithstanding the fact that they contain[ed] discussions of important public issues such as venereal disease and family planning" -- based on the combination of three factors: (1) the pamphlets were conceded to be advertising; (2) they made reference to specific products offered for sale by the manufacturer;[2] and (3) the manufacturer had an economic motivation for mailing the pamphlets. *Id.* at 66-68. Nor may a firm that offers a product for sale transform its advertisements into noncommercial speech by "'link[ing] [its]

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[2] The Court added, however, "we express no opinion as to whether reference to any particular product or service is a necessary element of commercial speech." *Bolger*, 463 U.S. at 67 n.14.

product to a current public debate.'" *Id.* at 68 (quoting *Central Hudson*, 447 U.S. at 563 n.5).

As *Bolger* illustrates, an *explicit* proposal of an economic transaction is not a prerequisite for speech to be deemed commercial. Indeed, the great majority of what is commonly understood to constitute commercial speech contains no such proposal. For example, many manufacturers pay premium advertising rates simply to display their product logo, on the assumption that the more familiar consumers are with the logo, the more likely they are to purchase the product; such displays quite clearly constitute commercial speech.

The Court has made plain, however, that at least some speech by corporations should be deemed noncommercial, even when widely disseminated. *Bolger*, for example, stated that companies are entitled to "the full panoply of [First Amendment] protections" when they make "comments on public issues" in at least some contexts. *Id.* The Court has rejected assertions that speech should be deemed commercial any time it is issued in the name of a for-profit corporation. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978).

The California Supreme Court's decision may well conflict with *Bellotti* and *Bolger* to the extent that it found the speech at issue in this case "commercial" based principally on a finding that Nike's speech was profit-motivated. Pet. App. 18a-22a. One can reasonably assume that a corporation will never speak publicly in its own name unless it believes that the speech will inure to the corporation's long-term financial interest -- in that sense it views its corporate name as one of its products. Thus, by suggesting that such a motivation is

sufficient to classify speech as "commercial," the California court in essence is suggesting, contrary to *Bellotti* and *Bolger*, that virtually all speech uttered by a corporation should be deemed commercial. Indeed, the dissenting justices on the California court leveled that very charge. Pet. App. 48a.

Moreover, the Court has made clear that there are at least some instances in which commercial speech is "inextricably intertwined" with noncommercial speech on matters of public interest. *Fox*, 492 U.S. at 474; *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 796 (1988). In those instances, the Court has held, the entirety of the speech is entitled to full First Amendment protection. *Id.*

An advertisement explicitly offering to sell a particular product undoubtedly is commercial speech. *Bellotti* held that a corporation that runs advertisements in its own name urging voters to oppose adoption of a graduated income tax is not engaged in commercial speech. In between those extremes lies significant amounts of speech by businesses that cannot easily be classified as either commercial or noncommercial.

B. Despite the Difficulties in Determining Whether Speech Qualifies as "Commercial," There Are Valid Reasons for Continuing to Draw the Basic Distinction Between Commercial and Noncommercial Speech

The difficulty in drawing a clear line between commercial and noncommercial speech has led some commentators to suggest that the entire distinction be scrapped. *See, e.g.*, Kozinski & Banner, *Who's Afraid of Commercial Speech*, 76 VA. L.REV. 627 (1990); Post, *The*

Constitutional Status of Commercial Speech, 48 UCLA L.REV. 1 (2000). Several members of this Court have expressed dissatisfaction with the *Central Hudson* formulation for distinguishing commercial and noncommercial speech. *See, e.g., Thompson v. Western States Medical Center,* 122 S. Ct. 1497, 1509 (2002) (Thomas, J., concurring); *44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484, 517-18 (Scalia, J., concurring in part and concurring in the judgment).

Nonetheless, there are valid reasons for continuing to draw the basic distinction between commercial and noncommercial speech and in granting the government somewhat freer rein in its regulation of the former than of the latter. In particular, speech uttered in a commercial context implicates the government's interest in "preservation of a fair bargaining process," an interest that often cannot be vindicated without some regulation of that speech. *44 Liquormart*, 517 at 501 (opinion of Stevens, J., joined by Kennedy and Ginsburg, JJ); accord, *Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525, 577 (2001) (Thomas, J., concurring in part and concurring in the judgment).

Often, governments will seek to preserve a "fair bargaining process" by regulating commercial speech to ensure that it is not false or misleading, nor even potentially so. On occasion, governments will be justified in regulating even fully truthful commercial speech in order to preserve a fair bargaining process. For example, the federal government has a strong interest in ensuring that no pharmaceutical is marketed for a particular intended use until the Food and Drug Administration (FDA) has tested the drug and approved it for that use. *Western States,* 122 S. Ct. at 1505. That interest is sufficient to permit the FDA to bar

companies from advertising the drug as safe and effective for a use that has not yet been approved by FDA, no matter how truthful the companies' claims may be. The government also has an interest in regulating truthful speech directed explicitly at children, who may lack the maturity to use wisely all the speech they might otherwise be given. For example, it seems logical to apply commercial speech standards to government regulation of truthful cigarette or alcohol advertising placed in a high school newspaper or in a school building. *Cf. Lorillard Tobacco,* 533 U.S. at 570-71. Such regulation would virtually never be permissible if the court were to scrap distinctions between commercial and noncommercial speech and begin applying normal (*i.e.*, heightened) First Amendment standards to both categories of speech.

Accordingly, it is unavoidable that courts will have to remain in the business of distinguishing between commercial and noncommercial speech. But because those distinctions will often be difficult to make, it makes sense for the Court to adopt alternative methods of resolving First Amendment claims in close cases.

II. SPEECH IS ENTITLED TO FULL FIRST AMENDMENT PROTECTION IF IT CONCERNS MATTERS OF PUBLIC INTEREST THAT DO NOT DIRECTLY RELATE TO THE CHARACTERISTICS OF A PRODUCT OR SERVICE OFFERED FOR SALE

As the California Supreme Court readily conceded, the speech at issue in this case was a matter of public interest; Nike's overseas labor practices have been widely debated in recent years, and there is widespread interest in Nike's views of the subject. Moreover, the speech said nothing about the

specific qualities and prices of goods offered for sale by Nike, and thus there was little danger that the speech could do anything to interfere with "a fair bargaining process." Under those circumstances, *amici* submit that there is ample precedent to justify a ruling that Nike's speech is entitled to full First Amendment protection.

A. The Court Consistently Has Given Greater First Amendment Protection to Speech on Matters of Public Interest

In a variety of contexts, the Court has consistently given enhanced levels of First Amendment protection to speech on matters of public interest. There is no reason not to expand that special regard for speech on matters of public interest into the commercial speech sphere.

When those seeking to disseminate information have been challenged by those asserting a privacy interest in nondissemination, the Court has consistently resolved such disputes by reference to whether the information involved a matter of public interest. *See, e.g., Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979) (publication of juvenile court proceedings; "if a newspaper obtains truthful information about *a matter of public significance*, then state officials may not constitutionally punish publication of the information, absent a need . . . of the highest order.") (emphasis added); *New York Times Co. v. United States*, 403 U.S. 713 (1971)(*per curiam*) (publication of Pentagon Papers over objections of federal government justified in part by fact that papers included information of great public concern); *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967). Most recently, in *Bartnicki v. Vopper*, 532 U.S. 514 (2001), the Court held that the First Amendment prevented individuals whose

illegally intercepted telephone conversations had been broadcast on a radio station from suing the radio station, in large measure because the conversations involved "information of public concern." 532 U.S. at 534. The Court explained:

> In these cases, privacy concerns give way when balanced against the interest in publishing matters of public importance. As Warren and Brandeis stated in their classic law review article: "The right of privacy does not prohibit any publication of matter which is of public or general interest." The Right to Privacy, 4 Harv. L.Rev. 193, 214 (1890). One of the costs associated with participation in public affairs is an attendant loss of privacy.

Id.

Similarly, the First Amendment right of government employees to speak freely (without fear of discipline by their employers) hinges to a large degree on the public importance of the issues addressed. The First Amendment prohibits a government from disciplining one of its employees for engaging in speech if: (1) the speech addresses a matter of public concern; and (2) the employee's speech rights outweigh the government employer's interest "in promoting efficiency of the public services it performs through its employees." *Pickering v. Bd. of Education*, 391 U.S. 563, 566 (1968).

First Amendment protection of speech on matters of public interest extends even to speech that is false. In *New York Times v. Sullivan*, 376 U.S. 254 (1964), the Court held that the First Amendment prohibited imposition of damages

in a libel suit filed in response to false information negligently included in a newspaper advertisement, in large measure because the plaintiff's status as a public figure made the case of public interest. The Court arrived at that conclusion after reviewing numerous cases that all relied on the "profound national commitment to the principle that debate *on public issues* should be uninhibited, robust, and wide open." *Id.* at 270 (emphasis added).

Similarly, in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), the Court held that the First Amendment does not prohibit States from permitting the award of presumed or punitive damages in libel cases involving wholly false speech where the defamatory statements do *not* involve matter of public concern, even in the absence of a showing of "actual malice." *Dun & Bradstreet*, 472 U.S. at 755-61 (plurality).[3] The Court thus declined to extend its ruling in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), which held that a showing of "actual malice" was required before such damages could be awarded in libel cases in which the false and defamatory statements *did* involve matters of public concern.

Amici do not contend that commercial speech should automatically be entitled to full First Amendment protection simply because it involves a matter of public concern. *See Bolger*, 463 U.S. at 67-68 (pamphlets distributed by manufacturer subject are to regulation under *Central Hudson* test "notwithstanding the fact that they contain discussion of important public issues."). But this Court's case law indicates that commercial speech involving a matter of public

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[3] *Dun & Bradstreet* involved a credit report on a private entity that admittedly included false information.

concern is entitled to a greater degree of First Amendment solicitude than commercial speech involving matters of purely private concern.

B. The Government's Interest in Regulating Speech To Preserve a Fair Bargaining Process Is Diminished When the Speech Does Not Directly Relate to the Characteristics of a Product or Service Offered for Sale

As noted above, recent decisions from this Court have made clear that the principal justification for permitting increased government regulation of commercial speech is to ensure that the government can preserve a fair bargaining process. That interest is considerably diminished if the commercial speech in question does not directly relate to the characteristics of a product or service offered for sale.

A State's interest in sanctioning false commercial speech undoubtedly is at its highest when the speech *does* directly concern the characteristics of the commercial speaker's product or service (*e.g.*, the price, efficacy, quality, value, or safety). It is precisely such speech that consumers are most likely to rely on when making purchase decisions. In contrast, speech of the type engaged in by Nike -- discussion of its general business operations -- may lead consumers to feel more warmly about a company and ultimately more likely to purchase one of the company's product, but it is highly unlikely that a consumer would rely on a company's statements regarding its general business operations as his primary basis for buying a specific product. The unlikelihood of such reliance suggests that a greater level of First Amendment breathing room ought to be afforded to

statements regarding general company policy, such as a company's overseas labor record.

In her dissenting opinion, Justice Brown suggested just such an analysis:

> Such an accommodation [of the relevant constitutional concerns] could permit states to bar *all* false or misleading representations about the characteristics of a product or service -- i.e., the efficacy, quality, value, or safety of the product or service -- without justification even if these characteristics have become a public issue. In such a situation, the governmental interest in protecting consumers from fraud is especially strong because these representations address the fundamental questions asked by every consumer when he or she makes a buying decision: does the product or service work well and reliably, is the product or service harmful and is the product or service worth the cost? Moreover, these representations are the traditional target of false advertising laws. Thus, the strong governmental interest in this context trumps any First Amendment concerns presented by a blanket prohibition on such false or misleading representations.
>
> By contrast, the governmental interest in protecting against consumer fraud is less strong if the representations are unrelated to the characteristics of the product or service. In some situations involving these representations, the First Amendment *may* trump this government interest. A blanket prohibition of false or misleading misrepresentations in such a situation would be unconstitutional because the prohibition may stifle

> the ability of business to comment on public issues. Indeed, this case offers a prime example.

Pet. App. 62a-63a.

Amici do not suggest that the First Amendment fully protects companies for any and all statements they make that do not directly relate to the characteristics of a product or service offered for sale. But *amici* submit that, as suggested by Justice Brown in dissent, such statements *are* fully protected to the extent that they touch upon matters of public concern.

C. Other Rationales Sometimes Put Forward in Support of Commercial Speech Restrictions Are Inapplicable to the Facts of This Case

In addition to its concern for preserving a fair bargaining process, the Court has identified two other rationales for withholding First Amendment protection from commercial speech that is false or misleading. First, commercial speech is thought to be hardier than other forms of speech. *Virginia Bd. of Pharmacy*, 425 U.S. at 772 n.24; *Bd. of Trustees v. Fox*, 492 U.S. at 481. Second, the truth of commercial speech is thought to be more easily verifiable by the disseminator. *Id.* Neither rationale has any application to the facts of this case.

The theory that commercial speech has more "hardiness" than other forms of speech is born of the belief that commercial cannot be chilled -- companies will always find a way to advertise products because they need to advertise in order to generate sales. What that theory overlooks is the type of advertising that companies are likely

to engage in. A company that seeks to increase its sales and profits can select from numerous options for achieving that goal. Corporate image advertising -- for example, an advertisement depicting a famous athlete working out while wearing clothing displaying the Nike insignia -- is one such option. Moreover, such advertising has as one of its greatest attractions the fact that, because it contains no statements of fact, it almost surely will not become the target of litigation. Accordingly, as California increases its constraints on corporations that seek to speak out on issues of significant public interest, such speech will be chilled as businesses turn to promotional techniques with fewer down sides. Overall corporate speech levels are likely to remain hardy if the decision below is affirmed, but speech on topics of public concern -- the very type of speech of which the First Amendment is most solicitous -- is likely to plummet.

The Court's other rationale for providing a lesser degree of First Amendment protection for commercial speech -- that supposedly its truth is more easily verifiable -- is similarly inapplicable in cases of this sort. To the extent that commercial speech involves the terms of a proposed sale or the characteristics of the product being offered for sale, the speaker is in a good position to verify any product claims: the speaker knows the terms of sale that he himself has established, and likely is well acquainted with the quality of his own product. But speech on matters of public concern that do not directly relate to the characteristics of a product or service offered for sale (*e.g.*, speech on an overseas labor policy) are far less easily verified.

In sum, none of the rationales for commercial speech restrictions cited by the Court in previous cases justifies restrictions on speech concerning matters of public interest

that do not directly relate to the characteristics of a product or service offered for sale.

III. BECAUSE THE NIKE SPEECH BEING CHALLENGED IN THIS CASE IS ENTITLED TO FULL FIRST AMENDMENT PROTECTION, THE COMPLAINT MUST BE DISMISSED

Under the First Amendment analysis set forth in the previous section, Nike is entitled to dismissal of the complaint filed by Respondent Kasky. Such dismissal is warranted regardless whether Nike's statements regarding its overseas labor policy are deemed commercial or noncommercial speech. Mr. Kasky does not contend that those statements relate to the quality of any of the products that Nike offers for sale. Nor does he deny that the statements involve a matter of considerable public interest.

Under First Amendment standards applicable to this case, Nike is not left totally unaccountable for its statements. The First Amendment would not protect Nike from claims that it spoke with "actual malice" -- knowledge of falsity or conscious disregard for the truth. But Mr. Kasky has not alleged that degree of culpability; he alleges only that Nike was negligent in its statements. Pet. App. 4a. Such allegations are insufficient to overcome a First Amendment defense.

CONCLUSION

Amici curiae Washington Legal Foundation and the Allied Educational Foundation respectfully request that the Court reverse the judgment of the California Supreme Court.

Respectfully submitted,

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